U.S. Department of Labor

Office of Administrative Law Judges
36 E. 7th St., Suite 2525
Cincinnati, Ohio 45202

(513) 684-3252
(513) 684-6108 (FAX)

Issue Date: 20 March 2007

Case No. 2005-BLA-5915

In the Matter of:
A.S.,[1] Widow of E.S.,
Claimant,

v.

LEECO, INC.,
c/o ACORDIA EMPLOYERS SERVICE,
Employer,

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party-in-Interest.

APPEARANCES:
Monica Rice-Smith, Esq.
On behalf of Claimant

John H. Baird, Esq.
On behalf of Employer

BEFORE: Thomas F. Phalen, Jr.
Administrative Law Judge

DECISION AND ORDER – DENIAL OF BENEFITS

[1] Effective August 1, 1006, the Department of Labor directed the Office of Administrative Law Judges, the Benefits Review Board, and the Employee Compensation Appeals Board to cease use of the name of the claimant and claimant family members in any document appearing on a Department of Labor web site and to insert initials of such claimant/parties in the place of those proper names. In support of this policy change, DOL has adopted a rule change to 20 C.F.R. Section 725.477, eliminating a requirement that the names of the parties be included in decisions. Also, to avoid unwanted publicity of those claimants on the web, the Department has installed software that prevents entry of the claimant's full name on final decisions and related orders. This change contravenes the plain language of 5 U.S.C. 552(a)(2) (which requires the internet publication), where it states that "in ***each case*** the justification for the deletion [of identification] shall be explained fully in writing." (*emphasis added*). The language of this statute clearly prohibits a "catch all" requirement from the OALJ that identities be withheld. Even if §725.477(b) gives leeway for the OALJ to no longer publish the names of Claimants – 5 U.S.C. 552(a)(2) clearly requires that the deletion of names be made on a case by case basis.

This is a decision and order arising out of a claim for benefits under Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended by the Black Lung Benefits Act of 1977, 30 U.S.C. §§ 901-962, ("the Act") and the regulations thereunder, located in Title 20 of the Code of Federal Regulations. Regulation section numbers mentioned in this Decision and Order refer to sections of that Title.[2]

On May 20, 2005, this case was referred to the Office of Administrative Law Judges by the Director, Office of Workers' Compensation Programs, for a hearing. (DX 37). A formal hearing on these matters was conducted on July 25, 2006, in Hazard, Kentucky by the undersigned Administrative Law Judge. All parties were afforded the opportunity to call and to examine and cross examine witnesses, and to present evidence, as provided in the Act and the above referenced regulations.

ISSUES

The issues in these cases are:

1. Whether the miner had pneumoconiosis;

2. Whether the miner's pneumoconiosis arose out of coal mine employment;

3. Whether the miner was totally disabled;

4. Whether the miner's disability was due to pneumoconiosis; and

---

I also strongly object to this policy change for reasons stated by several United States Courts of Appeal prohibiting such anonymous designations in discrimination legal actions, such as *Doe v. Frank,* 951 F. 2d 320 (11th Cir. 1992) and those collected at 27 Fed. Proc., L. Ed. Section 62:102 (Thomson/West July 2005). This change in policy rebukes the long standing legal requirement that a party's name be anonymous only in "*exceptional cases*." *See Doe v. Stegall*, 653 F.2d 180, 185 (5th Cir. 1981), *James v. Jacobson*, 6 F.3d 233, 238 (4th Cir. 1993), *and Frank* 951 F.2d at 323 (noting that party anonymity should be rarely granted)(*emphasis added*). As the Eleventh Circuited noted, "[t]he ultimate test for permitting a plaintiff to proceed anonymously is whether the plaintiff has a substantial privacy right which outweighs the customary and constitutionally-embedded presumption of openness in judicial proceedings." *Frank*, 951 F.2d at 323.

Finally, I strongly object to the specific direction by the DOL that Administrative Law Judges have a "mind-set" to use the complainant/parties' initials if the document will appear on the DOL's website, for the reason, *inter alia,* that this is not a mere procedural change, but is a "substantive" procedural change, reflecting centuries of judicial policy development regarding the designation of those determined to be proper parties in legal proceedings. Such determinations are nowhere better acknowledged than in the judge's decision and order stating the names of those parties, whether the final order appears on any web site or not. Most importantly, I find that directing Administrative Law Judges to develop such an initial "mind-set" constitutes an unwarranted interference in the judicial discretion proclaimed in 20 C.F. R. § 725.455(b), not merely that presently contained in 20 C.F.R. § 725.477 to state such party names.

[2] The Department of Labor amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 65 Fed. Reg. 80, 045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725 and 726). On August 9, 2001, the United States District Court for the District of Columbia issued a Memorandum and Order upholding the validity of the new regulations. All citations to the regulations, unless otherwise noted, refer to the amended regulations.

5. Whether the miner's death was due to pneumoconiosis;

(Tr.[3] 10-11).

Based upon a thorough analysis of the entire record in this case, with due consideration accorded to the arguments of the parties, applicable statutory provisions, regulations, and relevant case law, I hereby make the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Background

E.S. ("Miner") was born on July 14, 1951, and died on June 10, 2004, at the age of fifty-two. (DX 50). He married A.S. ("Claimant") on June 25, 1977, and the couple remained married until his death. (DX 47; Tr. 15). They had two sons, both of whom are adults. (Tr. 13). Claimant testified that both her sons remain dependent on her. (Tr. 14). The younger son is enrolled in college and lives at home. The older son no longer lives at home and has a job, but Claimant stated that he too is dependent on her. She works as a library aide and makes $251 every two weeks. (Tr. 15).

Claimant testified that when her husband returned home from work, he would be covered in a layer of black coal dust with rock dust on top of that. (Tr. 16). She stated that he had shortness of breath after staying in the sun or moving a lot. (Tr. 17). He also coughed all the time and had difficulty sleeping but he took no breathing medication. (Tr. 18). He was diagnosed with cancer in the fall of 2002, and it affected his lungs, bones, and adrenal gland. (Tr. 18). He was sick for about eighteen months before he agreed to see a doctor. (DX 57-10). His cancer ate away the bone in his left hip and leg, necessitating implantation of a titanium steel rod in the bone to avoid amputation. (DX 57-11).

Claimant deposed that her husband smoked for years, including the entire length of their marriage, but she was not certain how much he smoked. (DX 57-23). She estimated, however, that he smoked a pack of cigarettes a day. (DX 57-24). Miner deposed that he smoked one and a half packs of cigarettes a day since the age of 21. (DX 19).

Procedural History

Miner filed his claim for benefits on January 27, 2003. (DX 2). It was denied in a Proposed Decision and Order issued March 10, 2004 by the District Director. (DX 29). Miner requested a formal hearing before the Office of Administrative Law Judges on March 16, 2004. (DX 30). The claim was referred to the Office of Administrative Law Judges on June 17, 2004. (DX 37).

[3] In this Decision, "DX" refers to the Director's Exhibits, "CX" refers to the Claimants' Exhibit, "EX" refers to the Employer's Exhibit, "Miner's EX" refers to Employer's Exhibits that apply only to the miner's claim, "Widow's EX" refers to Employer's Exhibits that apply only to the widow's claim, and "Tr." refers to the official transcript of this proceeding.

Miner died on June 10, 2004. (DX 50-1). Claimant filed a survivor's claim on August 2, 2004. (DX 42). Pursuant to an Order Remanding Claim, Administrative Law Judge Daniel J. Roketenetz remanded the claim on August 31, 2004, for Miner's widow to be substituted as the claimant. (DX 40-18). Pursuant to an October 15, 2004 letter, a Department of Labor claims examiner informed the widow that she had been substituted as the claimant and that Miner's claim would be returned to the Office of Administrative Law Judges for a formal hearing once a decision had been issued in her claim. (DX 40-3). In a Proposed Decision and Order Denial of Benefits dated March 8, 2005, the District Director found that although the widow had established that Miner had pneumoconiosis arising out of coal mine employment, she had failed to establish that his death was due to pneumoconiosis. (DX 66-4). A March 14, 2005 letter from a claims examiner informed Claimant that Miner's claim was being held in abeyance pending a decision in the survivor's claim, and that if she did not appeal the decision in her claim, her husband's claim would be referred for a formal hearing and her claim would be administratively closed. (DX 67). Claimant timely requested a formal hearing before the Office of Administrative Law Judges. (DX 68). Because both claims have been referred to this Office, I find that they are both before me for adjudication.

Length of Coal Mine Employment

The parties stipulated to at least twenty-nine years of coal mine employment. (Tr. 10). I find that the record supports the stipulation, and, thus, I accept the stipulation. Claimant testified that Miner's last job was as an underground mechanic. (DX 57-13). Miner deposed that he was a repairman for the entire twenty-five years he worked for Leeco. (DX 19). It required heavy physical labor including lifting over fifty pounds regularly, tugging, and pulling. (DX 19).

MEDICAL EVIDENCE

Both claims are subject to the limitations set forth at 20 C.F.R. § 718.414. Section 718.101(b) requires any clinical test or examination to be in substantial compliance with the applicable standard in order to constitute evidence of the fact for which it is proffered. *See* §§ 718.102 - 718.107. The claimant and responsible operator are entitled to submit, in support of their affirmative cases, no more than two chest x-ray interpretations, the results of no more than two pulmonary function tests, the results of no more than two blood gas studies, no more than one report of each biopsy, and no more than two medical reports. §§ 725.414(a)(2)(i) and (3)(i). Any chest x-ray interpretations, pulmonary function studies, blood gas studies, biopsy report, and physician's opinions that appear in a medical report must each be admissible under § 725.414(a)(2)(i) and (3)(i) or § 725.414(a)(4). §§ 725.414(a)(2)(i) and (3)(i). Each party shall also be entitled to submit, in rebuttal of the case presented by the opposing party, no more than one physician's interpretation of each chest x-ray, pulmonary function test, arterial blood gas study, or biopsy submitted, as appropriate, under paragraphs (a)(2)(i), (a)(3)(i), or (a)(3)(iii). §§ 725.414(a)(2)(ii), (a)(3)(ii), and (a)(3)(iii). Notwithstanding the limitations of §§ 725.414(a)(2) or (a)(3), any record of a miner's hospitalization for a respiratory or pulmonary or related disease, or medical treatment for a respiratory or pulmonary or related disease, may be received into evidence. § 725.414(a)(4). The results of the complete pulmonary examination shall not be counted as evidence submitted by Miner under § 725.414. § 725.406(b).

Miner selected Glen Baker, M.D. to provide his Department of Labor sponsored complete pulmonary examination. (DX 12). Dr. Baker conducted the examination on April 26, 2003. (DX 13). I admit Dr. Baker's report under § 725.406(b). I also admit Dr. Barrett's quality-only interpretation of the April 26, 2003 chest x-ray under § 725.406(c). (DX 14).

Claimant completed a Black Lung Benefits Act Evidence Summary Form. (CX 1). She designated Dr. Baker's interpretation of the April 26, 2003 x-ray, (DX 13), Dr. Baker's PFTs of April 26, 2003 and January 8, 2004, (DX 13, 17), Dr. Baker's ABG of April 26, 2003, (DX 13), Dr. Baker's medical report of April 26, 2003, (DX 13), and Dr. Abalos's autopsy report dated June 11, 2004. (DX 51). This evidence complies with the requisite quality standards of §§ 718.102-107 and the limitations of § 725.414 (a)(3). Therefore, I admit the evidence and will consider it in this claim.

Employer completed separate Black Lung Benefits Act Evidence Summary Forms for the miner's and the widow's claims. (Miner's EX 8, Widow's EX 12). The first five exhibits are the same in both claims. Employer designated Dr. Rosenberg's reading of the April 30, 2003 x-ray as affirmative evidence, Dr. Halbert's reading of the April 26, 2003 x-ray in Miner's claim, and Dr. Wiot's reading of the April 26, 2003 x-ray as rebuttal evidence in the widow's claim. (EX 2; DX 15; EX 9). Employer further designated Dr. Rosenberg's PFT and ABG of April 30, 2003, Dr. Rosenberg's report of May 21, 2003, supplemental report of June 29, 2006, and his depositions of March 25, 2004 and July 14, 2006. (EX 1, 3, 4, 5). Employer designated Dr. Fino's June 30, 2006 report and August 7, 2006 deposition in Miner's claim, (Miner's EX 6, 7), and Dr. Vuskovich's report of July 7, 2006 and deposition of July 13, 2006 in the widow's claim. (Widow's EX 6, 7). Finally, Employer designated Dr. Caffrey's September 11, 2004 autopsy report and November 29, 2004 deposition in Miner's claim, (DX 54), and Dr. Oesterling's October 20, 2004 autopsy report in the widow's claim. (Widow's EX 8). Employer's evidence complies with the requisite quality standards of §§ 718.102-107 and the limitations of § 725.414 (a)(3). Therefore, I admit the evidence designated in Employer's summary.

The medical evidence is summarized below and has not been separated by claim. However, my analysis of the evidence will consider only that evidence that has been designated in each claim. Accordingly, I will consider Dr. Halbert's x-ray interpretation and the reports of Drs. Fino and Caffrey in Miner's claim only, and I will consider Dr. Wiot's x-ray interpretation and the reports of Drs. Vuskovich and Oesterling in the widow's claim only.

X-RAYS

Exhibit	Date of X-ray	Date of Reading	Physician / Credentials	Interpretation
DX 13	4/26/03	4/26/03	Baker / B-reader[4]	1/0

[4] A "B" reader is a physician who has demonstrated proficiency in assessing and classifying x-ray evidence of pneumoconiosis by successful completion of an examination conducted by or on behalf of the Department of Health and Human Services. This is a matter of public record at HHS National Institute for Occupational Safety and Health reviewing facility at Morgantown, West Virginia. (42 C.F.R. § 37.5l) Consequently, greater weight is given to a diagnosis by a "B" Reader. *See Blackburn v. Director, OWCP*, 2 B.L.R. 1-153 (1979).

DX 14	4/26/03	05/12/03	Barrett / B-reader, BCR[5]	Quality 1
DX 15	4/26/03	10/20/03	Halbert / B-reader, BCR	Negative
EX 9	4/26/03	07/15/04	Wiot / B-reader, BCR	Negative
EX 2	4/30/03	04/30/03	Rosenberg / B-reader	Negative

PULMONARY FUNCTION TESTS

Exhibit/ Date	**Co-op./ Undst./ Tracings**	**Age/ Height**	**FEV_1**	**FVC**	**MVV**	**FEV_1/ FVC**	**Qualifying Results**
DX 13 4/26/03	Fair/ Good/ Yes	51 71"	1.94	3.20	---	60%	No; Found acceptable by unknown doctor, but invalid by Drs. Fino & Vuskovich. (DX 17; Widow's EX 6).
EX 2 4/30/03	Good/ Good/ Yes	51 72"	2.60 1.78*	3.09 3.07*	55 65*	84% 58%	No Yes; Found invalid by Dr. Vuskovich due to suboptimal effort caused by weakness (Widow's EX 6).
DX 17 1/8/04	Fair/ Good/ Yes	52 71"	1.87	2.75	---	68%	Yes; Found acceptable by Dr. ? but invalid by Drs. Burki, Ranavaya, and Vuskovich due to suboptimal effort. (DX 17; Widow's EX 6).

*post-bronchodilator

[5] A physician who has been certified in radiology or diagnostic roentgenology by the American Board of Radiology, Inc., or the American Osteopathic Association. *See* 20 C.F.R. § 727.206(b)(2)(III). The qualifications of physicians are a matter of public record at the National Institute of Occupational Safety and Health reviewing facility at Morgantown, West Virginia.

ARTERIAL BLOOD GAS STUDIES

Exhibit	Date	pCO_{2*}	pO_{2*}	Qualifying
DX 13	4/26/03	29	95	No
EX 2	4/30/03	34.4	93	No

Death Certificate

Miner died on June 10, 2004. (DX 50). Dr. Hassan Ghazal completed the death certificate and listed lung cancer as the sole cause of death.

Autopsy Evidence

Dr. Antonio Abalos performed an autopsy on June 11, 2004. (DX 51). He performed both gross and microscopic examinations. His diagnoses were simple coal workers' pneumoconiosis, adenocarcinoma of the left lung, and both pleural effusions and adhesions.

P. Raphael Caffrey, M.D. reviewed the autopsy slides in his September 11, 2004 report. (DX 54). In his opinion, the pathological evidence revealed coal workers' pneumoconiosis of a mild degree, occupying 5% of the lung tissue. He did not feel this amount of CWP would have caused any disabling respiratory impairment. Dr. Caffrey set forth that the most significant findings were adenocarcinoma of the lung and moderate-to-severe centrilobular emphysema. In his opinion, death was due to lung cancer, and CWP did not cause, contribute to, or hasten death.

Dr. Caffrey was deposed on November 29, 2004. (DX 54). He is board certified in anatomical and clinical pathology. He reiterated his opinion as to the cause of death and the existence of pneumoconiosis. He also testified that coal dust normally does not cause centrilobular emphysema unless there is a large amount of it in the lung tissue.

Everett F. Oesterling, Jr., M.D. reviewed the autopsy slides in a report dated October 20, 2004. (EX 8). He found tissue evidence of a mild micronodular with macular coal workers' pneumoconiosis but added that the level of disease was insufficient to have altered Miner's pulmonary function. Therefore, he concluded that Miner would not have been disabled based by the CWP. Dr. Oesterling further opined that based on the mild degree of CWP, his dust exposure would not have hastened, contributed to, or caused Miner's death. The slides demonstrated marked panlobular emphysema progressing to bullous emphysema that Dr. Oesterling felt were caused by Miner's smoking. He also diagnosed a moderate to poorly differentiated adenocarcinoma with involvement of the lymphatic channels suggesting that the tumor had begun to spread beyond the confines of the lung. He asserted that the cancer precipitated Miner's death and that it was not a complication of CWP. He cited a medical journal article for the proposition that coal dust exposure does not cause lung cancer. Dr. Oesterling is board certified in anatomic pathology, clinical pathology, and nuclear medicine. (EX 10).

Medical Narrative Evidence

Dr. Glen R. Baker examined Miner on April 26, 2003. (DX 13). He considered an x-ray (1/0), a coal mine employment history (thirty years underground as a repairman), a smoking history (one pack of cigarettes a day since the age of twenty-one), a family history (diabetes), a medical history (lung cancer and gastroesophageal reflux disease), a PFT (moderate obstructive disease), symptoms (dyspnea and ankle edema), an ABG (within normal limits), and an EKG (normal). Physical examination was unremarkable. Dr. Baker diagnosed coal workers' pneumoconiosis, lung cancer with metastases to the kidneys and bone, and chronic obstructive pulmonary disease with a moderate obstructive defect. He attributed the CWP and COPD to coal dust exposure, while he also felt the COPD and cancer were due to cigarette smoking. He assessed a moderate impairment with decreased FEV1 and CWP. When these conditions were considered along with Miner's lung cancer with metastases, he opined that Miner was totally and permanently disabled. He felt the cause of the disability was all three diagnoses.

David M. Rosenberg, M.D. examined Miner on April 30, 2003, and provided a report dated May 21, 2003. (EX 1). He considered an x-ray (emphysema but not CWP), a coal mine employment history (thirty years underground, lastly as an equipment repairman lifting up to 100 pounds), a smoking history (two packs of cigarettes a day since for thirty years), a family history (negative for respiratory conditions), a medical history (lung cancer and leg fracture), a PFT (restrictive defect and decreased diffusing capacity probably due to emphysema), symptoms (dry cough), an ABG (normal), and an EKG (tachycardia). Physical examination showed hyperresonance but no rales. Dr. Rosenberg diagnosed diffuse emphysema or COPD due to smoking. Because he saw no micronodularity radiographically, he did not diagnose coal workers' pneumoconiosis and opined that Miner did not have the interstitial form of CWP. Dr. Rosenberg opined that he was disabled due to his lung cancer. He believed that from a strictly respiratory perspective, Miner could perform his last coal mine employment. He added that the lung cancer was unrelated to coal dust exposure.

Dr. Rosenberg was deposed on March 25, 2004. (EX 4). He provided his credentials as being board certified in internal medicine and pulmonary disease, and he testified that CWP causes crackles or rales on inhalation, whereas smoking causes rhonchi and wheezes on exhalation. Because CWP is a fixed disease, he would not expect to see improvement in pulmonary function after bronchodilation or improvement over time. He stated that such improvement demonstrates asthma or asthmatic bronchitis. Dr. Rosenberg further deposed that an increase in PO2 after exercise means there is no interstitial lung disease and that the air sac level is intact and functioning normally. He testified that smoking can cause and show on x-ray degrees of overinflation, hyperinflation, and emphysematous changes, and linear interstitial changes.

On June 29, 2006, Dr. Rosenberg provided a supplemental opinion based upon his review of his deposition, Dr. Baker's report, and Dr. Oesterling's report. (EX 3). Dr. Rosenberg opined that Miner had very mild CWP based on the autopsy evidence. He stated that he also had an emphysematous form of COPD because it was panlobular with bullae and bleb formation. He explained that emphysema caused by coal dust exposure, by contrast, begins as focal emphysema in and around the coal macules. While Miner had some of this form of emphysema, it was

clinically insignificant, and the overwhelming type of emphysema was panlobular. In his opinion, Miner's CWP was too mild to have caused respiratory impairment. Regarding the cause of Miner's death, Dr. Rosenberg explained that coal dust is not a carcinogen and that death was not due to coal mine employment. Rather, it was caused by lung cancer that would have occurred even absent coal mine employment. It was due to smoking.

Dr. Rosenberg was deposed again on July 14, 2006, at which time he had reviewed Dr. Baker's 2003 report and Dr. Oesterling's report. (EX 5). He testified that his opinions were the same: death was due to lung cancer, and coal workers' pneumoconiosis did not make the lung cancer progress.

Gregory J. Fino, M.D. reviewed medical evidence in a report dated June 30, 2006. (Miner's EX 6). He considered progress notes from Mary Breckinridge from September 1982 to November 1989; a hospital admission from May 1996; progress notes from Redbud Family Health Center from October 2002 to March 2003; a CT scan report; Dr. Baker's report; Dr. Rosenberg's reports and depositions; a January 8, 2004 PFT; the autopsy report; Dr. Caffrey's report and deposition; and x-ray readings by Drs. Baker, Halbert, and Rosenberg. Dr. Fino concluded that there was insufficient objective medical evidence to justify a diagnosis of CWP and that Miner had no respiratory impairment. He opined that Miner was not disabled from a respiratory standpoint and believed that even if Miner had CWP, it did not contribute to his disability or death. Rather, Dr. Fino believed that Miner's death was due to lung cancer and emphysema both caused by cigarette smoking, with coal mine dust inhalation playing no part in the etiology of either disease.

Dr. Fino was deposed on August 7, 2006. (Miner's EX 7). He testified that he is board certified in internal medicine and pulmonary medicine and is a B-reader. He corrected a conclusion stated in his report; he clarified that Miner definitely had pneumoconiosis based on the autopsy evidence. He added that the amount of pneumoconiosis Miner had would be "indiscernible in terms of causing any functional abnormalities or shortness of breath." (Miner's EX 7 at 9). He opined that Miner was disabled from a respiratory standpoint due to cigarette smoking-induced emphysema but not CWP. Dr. Fino explained that the amount of emphysema that is present in a coal miner that can be attributed to coal dust is directly proportional to the amount of pneumoconiosis that is present microscopically.

Matt Vuskovich, M.D. reviewed the medical evidence on July 7, 2006. (Widow's EX 6). He considered a coal mine employment history (thirty years underground), a smoking history (one to two packs of cigarettes a day for thirty-one years), and various medical records, including Dr. Baker's report, the death certificate, a CT scan, Dr. Rosenberg's reports and depositions, the autopsy report, and Dr. Oesterling's report. He further reviewed records from the Redbud Health Center, Dr. Varghese, and a hospitalization, as well as four x-ray readings between August 1985 and April 2003, three PFT's, and two ABG's. He diagnosed CWP by autopsy. Dr. Vuskovich found no pulmonary impairment and noted there were no complaints of shortness of breath when Miner was diagnosed with lung cancer and was still mining. In his opinion, the pneumoconiosis was not a substantially contributing cause of respiratory impairment. Nor did it cause Miner's death. Dr. Vuskovich opined that death was due to lung cancer.

Dr. Vuskovich was deposed on July 13, 2006. (Widow's EX 7). He is board-certified in occupational medicine and is a B-reader. He testified that Miner's CT scan showed cancer that had spread to the bones. Miner broke his femur due to weakening of the bone by the tumor. Miner was too weak to perform a valid PFT. The physician deposed that Miner had a very early stage of pneumoconiosis. He described it as an incidental finding. Dr. Vuskovich explained that Miner's cancer caused weight loss. Moreover, his cancer was stage four when detected, and that combined with paraneoplastic syndrome is 100% fatal. In his opinion, Miner died from the metabolic effects of cancer, and metastases spread to the organs and degenerated them. Dr. Vuskovich testified that emphysema due to coal dust exposure is focal and has to be significant to cause substantial impairment. In his opinion, Miner's emphysema was the type seen in smokers, so it was not due to coal dust exposure.

Smoking History

Miner deposed that he smoked one and a half packs of cigarettes a day from the age of twenty-one, for a total of thirty-one years. I find this to be consistent with the data found in the medical reports. Therefore, I find that Miner smoked between one and one and a half packs of cigarettes a day for thirty-one years.

DISCUSSION AND APPLICABLE LAW

Miner's Claim

Claimant's claim was made after March 31, 1980, the effective date of Part 718, and must therefore be adjudicated under those regulations. To establish entitlement to benefits under Part 718, Claimant must establish, by a preponderance of the evidence, that Miner:

1. Was a miner as defined in this section; and

2. Met the requirements for entitlement to benefits by establishing that he:

   (i) Had pneumoconiosis (see § 718.202), and

   (ii) The pneumoconiosis arose out of coal mine employment (see § 718.203), and

   (iii) Was totally disabled (see § 718.204(c)), and

   (iv) The pneumoconiosis contributed to the total disability (see § 718.204(c)); and

3. Filed a claim for benefits in accordance with the provisions of this part.

Section 725.202(d)(1-3); *see also* §§ 718.202, 718.203, and 718.204(c).

Pneumoconiosis

In establishing entitlement to benefits, Claimant must initially prove the existence of pneumoconiosis under § 718.202. Claimant has the burden of proving the existence of pneumoconiosis, as well as every element of entitlement, by a preponderance of the evidence. *See Director, OWCP v. Greenwich Collieries*, 512 U.S. 267 (1994).

Pneumoconiosis is defined by the regulations:

> (a) For the purpose of the Act, "pneumoconiosis" means a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment. This definition includes both medical, or "clinical" pneumoconiosis and statutory, or "legal" pneumoconiosis.
>
> (1) *Clinical Pneumoconiosis*. "Clinical pneumoconiosis" consists of those diseases recognized by the medical community as pneumoconiosis, i.e., conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment.
>
> (2) *Legal Pneumoconiosis*. "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment.
>
> (b) For the purposes of this section, a disease "arising out of coal mine employment" includes any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment.
>
> (c) For purposes of this definition, "pneumoconiosis" is recognized as a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure.

§§ 718.201(a-c).

Employer, by brief, concedes that pneumoconiosis has been established by the pathologic evidence. Based on the evidence, I accept this concession. Dr. Abalos diagnosed simple CWP based on the autopsy, and both Dr. Caffrey and Dr. Oesterling, who reviewed the autopsy slides for the Employer, concurred with that finding. Therefore, I find that the autopsy evidence, the most reliable evidence of the existence of pneumoconiosis, establishes the same by a preponderance of the evidence pursuant to § 718.202(a). *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211 (4th Cir. 2000).

Arising out of Coal Mine Employment

In order to be eligible for benefits under the Act, Claimant must prove that pneumoconiosis arose, at least in part, out of Miner's coal mine employment. § 718.203(a). As I have found that Claimant established at least twenty-nine years of coal mine employment, she is entitled to the rebuttable presumption set forth in § 718.203(b) that Miner's pneumoconiosis arose out of coal mine employment. No evidence has been put forth to rebut that presumption.

Total Disability

Claimant may demonstrate that Miner was totally disabled from performing his usual coal mine work or comparable work due to pneumoconiosis under one of the five standards of § 718.204(b) or the irrebuttable presumption referred to in § 718.204(b). The Board has held that under § 718.204(b), all relevant probative evidence, both like and unlike must be weighed together, regardless of the category or type, in the determination of whether the Claimant was totally disabled. *Shedlock v. Bethlehem Mines Corp.*, 9 B.L.R. 1-195 (1986); *Rafferty v. Jones & Laughlin Steel Corp.*, 9 B.L.R. 1-231 (1987). Claimant must establish this element of entitlement by a preponderance of the evidence. *Gee v. W.G. Moore & Sons*, 9 B.L.R. 1-4 (1986).

There is no evidence that Claimant has established that Miner suffered from complicated pneumoconiosis. Therefore, the irrebuttable presumption of § 718.304 does not apply.

Total disability can be shown under § 718.204(b)(2)(i) if the results of pulmonary function studies are equal to or below the values listed in the regulatory tables found at Appendix B to Part 718. There are three PFTs. The April 26, 2003 study did not yield qualifying values and was deemed invalid by Dr. Fino. The April 30, 2003 study produced qualifying values only after the administration of a bronchodilator.[6] The January 8, 2004 study also produced qualifying results, but the study was found invalid by Drs. Burki and Ranavaya due to suboptimal effort. I note that a physician whose signature is illegible found the April 26, 2003 and January 8, 2004 studies to be acceptable. However, because I cannot determine the identity of that physician and because I find the opinions of the doctors who invalidated the studies to be credible, I discount the validations. Consequently, I only consider the study of April 30, 2003 to be both qualifying and valid. As a result, I find that Claimant has established total disability pursuant to § 718.204(b)(2)(i).

Total disability can be demonstrated under § 718.204(b)(2)(ii) if the results of arterial blood gas studies meet the requirements listed in the tables found at Appendix C to Part 718. There are two ABGs. Neither yielded qualifying values. Accordingly, I find that the Claimant has failed to establish, by a preponderance of the evidence, the existence of total disability under subsection (b)(2)(ii).

Total disability may also be shown under § 718.204(b)(2)(iii) if the medical evidence indicates that Miner suffered from cor pulmonale with right-sided congestive heart failure. The

[6] While this study was deemed invalid by Dr. Vuskovich due to insufficient effort due to weakness stemming from cancer, his testimony was not offered in the Miner's claim.

record does not contain any evidence indicating that he suffered from cor pulmonale with right-sided congestive heart failure. Therefore, I find that Claimant has failed to establish the existence of total disability under subsection (b)(2)(iii).

Section 718.204(b)(2)(iv) provides for a finding of total disability if a physician, exercising reasoned medical judgment based on medically acceptable clinical or laboratory diagnostic techniques, concludes that a miner's respiratory or pulmonary condition prevented Miner from engaging in his usual coal mine employment or comparable gainful employment. Claimant's usual coal mine employment was as an underground repairman, and this job required heavy manual labor.

The exertional requirements of the claimant's usual coal mine employment must be compared with a physician's assessment of the claimant's respiratory impairment. *Cornett v. Benham Coal, Inc.*, 227 F.3d 569 (6th Cir. 2000). Once it is demonstrated that Miner is unable to perform his usual coal mine work, a *prima facie* finding of total disability is made and the party opposing entitlement bears the burden of going forth with evidence to demonstrate that Miner is able to perform "comparable and gainful work" pursuant to § 718.204(b)(1). *Taylor v. Evans & Gambrel Co.*, 12 B.L.R. 1-83 (1988). Nonrespiratory and nonpulmonary impairments have no bearing on establishing total disability due to pneumoconiosis. § 718.204(a); *Jewell Smokeless Coal Corp. v. Street*, 42 F.3d 241 (1994). All evidence relevant to the question of total disability due to pneumoconiosis is to be weighed, with the claimant bearing the burden of establishing by a preponderance of the evidence the existence of this element. *Mazgaj v. Valley Camp Coal Co.*, 9 B.L.R. 1-201 (1986).

Dr. Caffrey opined that Miner's mild degree of CWP would not have caused any disabling respiratory impairment. Dr. Baker assessed a moderate impairment but also felt Miner was totally disabled when his cancer was considered together with the CWP and COPD. Dr. Rosenberg asserted that Miner was not disabled from returning to coal mine employment from a strictly respiratory perspective but added that Miner was disabled due to lung cancer. Dr. Fino opined that Miner was disabled from a respiratory standpoint due to cigarette smoke-induced emphysema but not CWP.

Dr. Caffrey's opinion addresses only the extent of respiratory disability caused by CWP; it does not address whether Miner was totally disabled from a pulmonary impairment from any other cause. Therefore, I give no weight to Dr. Caffrey's opinion on this particular issue. Drs. Baker, Rosenberg, and Fino agreed that Miner was totally disabled when all the conditions affecting his pulmonary ability were considered: cancer, emphysema, and CWP. I find these opinions to be well reasoned and documented. *Perry v. Director, OWCP*, 9 BLR 1-1 (1986). Drs. Baker and Rosenberg had the opportunity to examine Miner within fourteen months of his death. Dr. Fino considered most of the medical evidence of record in reaching his conclusion. Therefore, I find that all three doctors had an accurate assessment of Miner's condition close to the time of his death. They were also aware of the exertional requirements of being an underground repairman. I place great weight on their opinions and conclude that Miner was totally disabled pursuant to § 718.204(b)(2)(iv).

After considering all the evidence together under this section, I find the both the PFT evidence and medical opinion evidence establishes total disability. I find the medical opinions more persuasive than the ABG evidence because it takes into account the whole person, not simply one objective test. Accordingly, I find that Claimant has established that Miner was totally disabled pursuant to § 718.204(b)(2).

Total Disability Causation

Claimant must also establish that Miner's total disability was due to pneumoconiosis by a preponderance of the evidence. *Baumgartner v. Director, OWCP*, 9 BLR 1-65, 1-66 (1986); *Gee v. Moore & Sons*, 9 BLR 1-4, 1-6 (1986) (en banc). In *Grundy Mining Co. v. Director, OWCP [Flynn]*, 353 F.3d 467 (6th Cir. 2003), the Sixth Circuit set forth the standard for establishing that a miner's total disability is due to pneumoconiosis:

> The claimant bears the burden of proving total disability due to pneumoconiosis and . . . this causal link must be more than *de minimus*. (Citation omitted). To satisfy the 'due to' requirement of the BLBA and its implementing regulations, a claimant must demonstrate by a preponderance of the evidence that pneumoconiosis is 'more than merely a speculative cause of his disability,' but instead 'is a contributing cause of some discernible consequence to his totally disabling respiratory impairment.' (Citation omitted). To the extent that the claimant relies on a physician's opinion to make this showing, such statements cannot be vague or conclusory, but instead must reflect reasoned medical judgment. (Citation omitted).

As stated above, Dr. Caffrey opined that Miner's CWP would not have caused any disabling impairment. I place some weight on Dr. Caffrey's opinion because of his expertise and opportunity to view the autopsy slides. Dr. Rosenberg asserted that Miner's disability was caused by his cancer and not CWP. I place great weight on Dr. Rosenberg's opinion. He cogently explained that Miner did not exhibit any physical manifestations of disability due to CWP—there were no crackles or rales on inspiration. The hyper resonance shown on examination was due to emphysema caused by smoking. Drs. Rosenberg and Fino agreed that the overwhelming type of emphysema in this case was panlobular, which is caused by smoking. Furthermore, the ABGs were normal, and the degree of Miner's CWP was mild according to the pathologists. Dr. Fino deposed that Miner was disabled due to emphysema caused by smoking but not CWP. I place some weight on his opinion. Dr. Fino's written report asserted that Miner neither had pneumoconiosis nor had a respiratory impairment. This is contrary to his deposition. I place no weight on Dr. Fino's report but find that his deposition represents his opinion in this case. His opinion supports Dr. Caffrey's and Dr. Rosenberg's. It is consistent with the findings of panlobular emphysema and mild CWP.

Dr. Baker attributed Miner's total disability to CWP, COPD, and lung cancer. I place less weight on Dr. Baker's opinion because he was not privy to any of the autopsy evidence that demonstrated mild CWP compared with extensive panlobular emphysema. Furthermore, the PFT he considered was invalidated, and his knowledge of this may have altered his opinion. For

the foregoing reasons, I place the greatest weight on Dr. Rosenberg's opinion, as supported by Dr. Caffrey's and Dr. Fino's. Accordingly, I find that although Miner was totally disabled by a pulmonary impairment, Claimant has failed to establish by a preponderance of the evidence that Miner's total disability was due to pneumoconiosis.

Widow's Claim

The widow's claim was made after March 31, 1980, the effective date of Part 718, and must therefore be adjudicated under those regulations. To establish entitlement to benefits under Part 718, she must establish, by a preponderance of the evidence, that that her husband:

2. Was a miner as defined in this section; and

3. Met the requirements for entitlement to benefits by establishing that he:

(i) Had pneumoconiosis (see § 718.202), and

(ii) The pneumoconiosis arose out of coal mine employment (see § 718.203), and

(iii) Was the cause of his death (see § 718.205),

3. Has filed a claim for benefits in accordance with the provisions of this part.

Section 725.202(d)(1-3); *see also* §§ 718.202, 718.203, and 718.205. It has already been established that Miner suffered from pneumoconiosis arising out of his coal mine employment.

Death Due to Pneumoconiosis:

Claimant filed her claim on August 2, 2004. (DX 42). Therefore, entitlement to benefits must be established under the regulatory criteria at Part 718. *See Neeley v. Director, OWCP*, 11 B.L.R. 1-85 (1988). Section 718.205 provides that benefits are available to eligible survivors of a miner whose death was due to pneumoconiosis. An eligible survivor will be entitled to benefits if any of the following criteria are met:

> Where competent medical evidence establishes that pneumoconiosis was the cause of the miner's death; or
>
> Where pneumoconiosis was a substantially contributing cause or factor leading to the miner's death or where death was caused by complications of pneumoconiosis; or
>
> Where the presumption set forth in § 718.304 (evidence of complicated pneumoconiosis) is applicable.

§ 718.205(c).

In order to be eligible for benefits, widow must prove that miner's death was caused by pneumoconiosis. Although the Benefits Review Board requires that death must be "significantly" related to or aggravated by pneumoconiosis, the circuit courts have developed the "hastening death" standard which requires establishment of a lesser causal nexus between pneumoconiosis and the miner's death. The Sixth Circuit reaffirmed its holding in *Brown v. Rock Creek Mining Corp.*, 996 F.2d 812 (6th Cir. 1993) (J. Batchelder dissenting), to state that benefits are awarded to a survivor who establishes that "pneumoconiosis is a substantially contributing cause or factor leading to the miner's death if it serves to hasten that death in any way." *Griffith v. Director, OWCP*, 49 F.3d 184 (6th Cir. 1995). The new regulations also adopt this definition. § 718.203(c)(5). In order to recover benefits, widow must prove through medical opinion evidence that pneumoconiosis hastened her husband's death in some manner.

The death certificate lists lung cancer as the sole cause of death. However, there is no indication that the physician who signed the death certificate had any prior knowledge of Miner's condition. Therefore, I place little weight on the death certificate. *Smith v. Camco Mining, Inc.*, 13 B.L.R. 1-17 (1989).

Dr. Baker did not address the issue of cause of death. Dr. Oesterling opined that cancer was the cause of Miner's death and that CWP did not hasten or cause Miner's death. Drs. Rosenberg and Vuskovich also asserted that CWP did not hasten or contribute to Miner's death, which was the result of lung cancer due to smoking.

The opinion evidence is unanimous. I place great weight on the opinions of Drs. Oesterling, Rosenberg, and Vuskovich because they are well documented and reasoned. *Perry v. Director, OWCP*, 9 BLR 1-1 (1986). Dr. Oesterling's opinion also merits great weight because he reviewed the autopsy slides and his expertise is in the structural and functional manifestations of disease. *Scott v. Director, OWCP*, 14 B.L.R. 1-38 (1990). The opinions of Drs. Rosenberg and Vuskovich are based on a review of extensive medical evidence, thus providing them with a broad base of data from which to draw their conclusions. The autopsy evidence substantiated a finding of only mild CWP. Miner worked until October 2002 and did not complain of respiratory distress. Physical examinations were not remarkable. His pulmonary function studies were not reliable because of weakness caused by his cancer and the treatment for that cancer. I find most persuasive Dr. Vuskovich's explanation that Miner's metastatic cancer, combined with paraneoplastic syndrome, led to malnutrition, organ destruction, and bone degeneration, and, ultimately death. Miner had an extensive smoking history that accounted for his lung cancer. Based on these factors and the uniformity of opinion, I find that Claimant has not established that her husband's death was hastened or caused by pneumoconiosis.

Entitlement

A.S. has failed to establish that Miner's total disability and death were a result of pneumoconiosis. Therefore, I find that Claimant is not entitled to benefits under the Act.

Attorney's Fees

An award of attorney's fees is permitted only in cases in which the claimant is found to be entitled to benefits under the Act. Because benefits are not awarded in these cases, the Act prohibits the charging of any fee to the Claimant for the representation and services rendered in pursuit of the claim.

ORDER

IT IS ORDERED that the claims of A.S., on behalf of E.S. and as his survivor, for benefits under the Act are hereby DENIED.

A

THOMAS F. PHALEN, JR.
Administrative Law Judge

NOTICE OF APPEAL RIGHTS

NOTICE OF APPEAL RIGHTS: If you are dissatisfied with the administrative law judge's decision, you may file an appeal with the Benefits Review Board ("Board"). To be timely, your appeal must be filed with the Board within thirty (30) days from the date on which the administrative law judge's decision is filed with the district director's office. *See* 20 C.F.R. §§ 725.458 and 725.459. The address of the Board is: Benefits Review Board, U.S. Department of Labor, P.O. Box 37601, Washington, DC 20013-7601. Your appeal is considered filed on the date it is received in the Office of the Clerk of the Board, unless the appeal is sent by mail and the Board determines that the U.S. Postal Service postmark, or other reliable evidence establishing the mailing date, may be used. *See* 20 C.F.R. § 802.207. Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

After receipt of an appeal, the Board will issue a notice to all parties acknowledging receipt of the appeal and advising them as to any further action needed.

At the time you file an appeal with the Board, you must also send a copy of the appeal letter to Allen Feldman, Associate Solicitor, Black Lung and Longshore Legal Services, U.S. Department of Labor, 200 Constitution Ave., NW, Room N-2117, Washington, DC 20210. *See* 20 C.F.R. § 725.481.

If an appeal is not timely filed with the Board, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 20 C.F.R. § 725.479(a).